

No. 15-60669

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

**VCNCL, L.L.C., doing business as VINEYARD COURT NURSING AND
REHABILITATION CENTER**

Respondent

**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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ORAL ARGUMENT STATEMENT

The Board believes that this case involves the straightforward application of well-settled law to the facts. However, to the extent the Court believes that oral argument would be helpful or grants the Company's request for oral argument, the Board requests the opportunity to participate.

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STATEMENT OF JURISDICTION

This case is before the Court on the application of the National Labor Relations Board (“the Board”) to enforce a Decision and Order issued by the Board on July 14, 2015, and reported at 362 NLRB No. 147. (ROA. 369-371.)¹ The

¹ “ROA.” refers to the administrative record on appeal filed on November 17, 2015, and amended on December 2 and 17, 2015. The ROA. includes the transcript of the representation hearing before the Board Hearing Officer (Record Volume I, ROA. 1-216), the exhibits introduced at the hearing (Record Volume II,

Board found that VCNCL, LLC d/b/a Vineyard Court Nursing and Rehabilitation Center (“the Center”) unlawfully refused to bargain with the Retail Wholesale and Department Store Union, AFL-CIO (“the Union”), which the Board certified as the bargaining representative of a unit of the Center’s employees. (ROA. 511.) The Board’s Order is final with respect to both parties under Section 10(e) of the National Labor Relations Act, as amended. 29 U.S.C. §§ 151, 160(e) (“the Act”). The Union has intervened on the Board’s behalf.

The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the Act, 29 U.S.C. § 160(a), which empowers the Board to prevent unfair labor practices. This Court has jurisdiction pursuant to Section 10(e) of the Act because the Center transacts business within this Circuit. The Board filed its application on September 28, 2015. The application was timely because the Act places no time limitations on such filings.

The Board’s unfair-labor-practice Order is based in part on findings made in an underlying representation proceeding (Board Case No. 15-RC-114384), in which the Center contested the Board’s certification of the Union as the employees’ collective-bargaining representative. Pursuant to Section 9(d) of the Act, 29 U.S.C. § 159(d), the record in that proceeding is part of the record before

ROA. 217-38), and the pleadings before the Board and the Board decisions under review (Record Volume III, ROA. 239-371). References before a semicolon are to the Board’s findings; those following are to the supporting evidence.

this Court. *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477, 479 (1964). Section 9(d) does not give the Court general authority over the representation proceeding, but authorizes judicial review of the Board’s actions in a representation proceeding for the limited purpose of deciding whether to “enforce[e], modify[], or set[] aside in whole or in part the [unfair labor practice] order of the Board.” The Board retains authority under Section 9(c) of the Act, 29 U.S.C. § 159(c), to resume processing the representation case in a manner consistent with the Court’s ruling in the unfair-labor-practice case. *See, e.g., Freund Baking Co.*, 330 NLRB 17, 17 & n.3 (1999).

STATEMENT OF THE ISSUES

The ultimate issue in this case is whether the Board properly found that the Center violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by refusing to bargain with the Union. Specific subsidiary issues are:

1. Whether the Board acted within its discretion in determining that a unit of the Center’s service and maintenance employees, including Certified Nursing Assistants (“CNAs”) but excluding Licensed Practical Nurses (“LPNs”), constitutes an appropriate unit for collective bargaining.

2. Whether the Board acted within its discretion in overruling the Center’s election objections without a hearing because the Center failed to provide any evidence that, if credited, would warrant setting aside the election.

STATEMENT OF THE CASE

This case requires the Court to decide if the Board acted within its discretion in directing an election in an appropriate unit of the Center's employees and in certifying the Union as the employees' bargaining representative, and therefore properly ordered the Center to bargain with the Union. The Center refuses to recognize or bargain with the Union, and instead challenges the Board's unit determination and raises objections to the election. The record amply supports the Board's finding that a unit of service and maintenance employees at a nursing facility, comprised of CNAs, and dietary, laundry, housekeeping, activity, maintenance, and social services employees, constitutes an appropriate unit for bargaining. Moreover, the Center failed to meet its high burden of proving that LPNs must be included in the unit for it to be "*an appropriate unit.*" The Board reasonably found that the Center failed to provide any evidence that, if credited, would warrant setting aside the election. The Board's findings in the representation and unfair-labor practice-proceedings, as well as the Decision and Order under review, are summarized below.

I. The Representation Proceeding

The Union filed an election petition on September 30, 2013. (ROA. 296; 322(005).) The Union sought to represent a unit of the Center's employees that included all full- and part-time dietary employees, laundry employees,

housekeeping employees, and CNAs. The unit sought by the Union excluded all LPNs, Registered Nurses (“RNs”), Activity Directors, professional and technical employees, office and clerical associates, and guards and supervisors as defined in the Act. (ROA. 322 (005).) The Center challenged the petition, contending that an appropriate unit must also include the LPNs and RNs, as well as maintenance employees (the “Maintenance Supervisor” and “Maintenance Assistant”), activity employees (the “Activity Director” and “activity assistant”), the Social Services Director, the Business Office Manager, and some specialty nurses. (ROA. 243; 205-13.)²

A. Facts Established at the Unit Determination Hearing

A hearing officer held a hearing on October 31, 2013. (ROA. 240; 1-216.)

The hearing established the following facts.

1. The Facility

The Center is a non-acute care retirement and assisted living facility in Columbus, Mississippi. It is one of eight nursing facilities owned and operated by Briar Hill Management, LLC. (ROA. 243; 13.) The Center consists of a main building and a laundry building attached to the main building by a 20-30 foot-long breezeway. (ROA. 244; 88.) The largest area in the Center’s main building is the

² At the hearing, the parties stipulated to exclude the Business Office Manager from the unit. (ROA. 210.)

resident area, which has beds for 54 residents. (ROA. 244; 121.) A nurse's station is at the center of the resident area, and hallways leading to the residents' rooms radiate out from the nurses' station. The main building also has a kitchen, dining room, whirlpool room, administrative offices, and other miscellaneous common spaces. (ROA. 244; 85-85, 88, 168-69.)

2. Organizational Structure

Reita Hall is Briar Hill's Director of Operations. Hall oversees all eight of Briar Hill's nursing facilities, including the Center. The Administrator of the Center, W. Luke Rhinewalt, is in charge of the Center and reports to Hall. The Dietary Manager, Maintenance Supervisor, Housekeeping/Laundry Supervisor, Social Services Director, Activity Director, Director of Nursing ("DON"), Director of Human Resources, and Business Office Manager all report to Rhinewalt. (ROA. 244-45; 29-35, 56-57, 229.)

The Dietary Manager supervises two cooks and a number of dietary aides. The Housekeeping/Laundry Supervisor supervises three housekeepers, a floor technician, and three laundry employees. The Activity Director has an Activity Assistant, and the Maintenance Supervisor has a Maintenance Assistant. The DON has four RNs, fifteen LPNs, approximately 30 CNAs, and four specialty nurses reporting to her. (ROA. 244-45; 29-35, 56-57, 229.)

3. Employees Share Many Terms and Conditions of Employment, Provide Services for Residents, and Participate in Resident Activities

All of the employee classifications are paid hourly, record their time on a time clock, and are eligible for overtime. All employees have the same benefits, such as insurance, vacation time, and discounted meal purchase plans. In addition, all of the Center's employees may use the dining room as a break room or lunch room when it is not being used by the residents for meals. (ROA. 245; 37, 113-114, 129-30.) All employees occasionally attend meetings together. (ROA. 246; 114.)

As set out more specifically for each classification below, all employees have a role in providing services for residents. Common services provided by all or most of the employees include answering resident call lights, participating in activities with residents such as field trips and barbeques, and following each resident's Plan of Care, which outlines each resident's specific needs. (ROA. 245; 60-69, 113, 116, 131-32, 159, 181).³ The Plan of Care is developed with input from nursing staff, CNAs, the Social Services Director, and the Dietary Manager. (ROA. 245; 67-69.)

³ A housekeeping employee, who was formerly a dietary employee, testified that she was not allowed on the residents halls to answer call lights (ROA. 174), but a CNA testified she had seen dietary employees answer call lights. (ROA. 131).

4. Individual Employee Classifications

a. Dietary employees

Dietary employees—cooks and dietary aides—work in the kitchen on one of two shifts. The cooks are responsible for cooking three meals and three snacks each day, and the dietary aides assist them and perform preparation and cleanup work in the kitchen. (ROA. 249; 81-83.)

For residents who eat in the dining room, a dietary aide passes a tray of food through the kitchen window to a CNA who gives the tray to the resident to take to the dining room. Although dietary employees other than the Dietary Manager are not allowed direct resident contact, occasionally a resident may approach the kitchen window and ask for a cup of coffee, and in those instances the dietary aide will bring it to the resident in the dining room. (ROA. 249; 85.) For patients who eat in their rooms, dietary aides bring food carts to the nurses' station for CNAs to distribute to residents. (ROA. 249-50; 84, 119, 120). At those times, the dietary aides interact with other employees who may be near the nurses' station. (ROA. 117-19.)

b. Laundry employees

Laundry employees wash items owned by the facility as well as resident clothing. They work in the laundry building separated by a breezeway from the

main building. (ROA. 250; 88-89.) Two laundry employees work in the morning and one works in the afternoon. (ROA. 250; 89-90.)

Laundry employees pick up soiled linens that the CNAs have collected and left at a collection point in the resident area. Laundry employees also collect residents' soiled clothing from the residents' rooms. Laundry employees bring the soiled linens and clothing to the laundry room. After they have washed the linens and clothing, laundry employees return the clean linen to a linen closet or cart in the resident area, and bring the clothing to the residents' rooms. (ROA. 250; 92-93.) Laundry employees interact with CNAs and other employees in the main area when bringing laundry to carts and to residents' rooms. (ROA. 118-120.)

c. Housekeeping employees

Housekeeping employees are responsible for cleaning the residents' rooms, the hallways, and other common areas. (Tr. 139.) They work on one shift during the day. (Tr. 165.) Housekeeping employees are not allowed direct contact with the residents, but may hand a resident a tissue if the resident asks for one while the housekeeping employee is in the room. (ROA. 251; 159.) Like the dietary and laundry employees, housekeeping employees interact with CNAs daily when they are in the residents' area. (ROA. 113-14.) If dietary employees run out of paper towels or other sundries, they come to a housekeeping employee for those supplies. (ROA. 162-63.)

d. Activities employees

The activities employees—the Activity Director and Activity Assistant—are responsible for coordinating activities for the residents. All employees have participated in these activities. These activities include events at the facility, such as Bingo and holiday parties, as well as field trips, such as trips to Wal-mart, or an annual breast cancer walk. (ROA. 251; 60.)

The Activity Director is in charge of arranging the activities and the Activity Assistant assists her. The Activity Assistant does paperwork, transports residents, and directs activities. The Activity Director also solicits volunteers from other employees to assist the residents during the activities. (ROA. 251; 60.)

e. Social Services Director

The Social Services Director is responsible for meeting the psycho-social needs of the residents. She conducts the initial interview of a prospective resident and is involved in the initial assessment of a resident to determine whether the person is eligible to live in the facility. (ROA. 252; 63-66.) As noted above, the Social Services Director helps with each resident's Plan of Care. (ROA. 252; 67.) Consistent with this, she conducts regular assessments of the residents, for which she collects information from other employees including CNAs, LPNs, and dietary employees. The Social Services Director talks with residents, meets with family members, and arranges visits with clergy or others. (ROA. 252; 63-66.)

f. Maintenance employees

Maintenance employees—a Maintenance Supervisor and a Maintenance Assistant position—maintain the Center’s facilities and equipment and make repairs as needed.⁴ Employees who notice a broken piece of equipment are expected to take the equipment out of service and report it to the maintenance employees. The Administrator or DON calls outside repair technicians if the maintenance employees cannot fix the problem. (ROA. 251-52; 49-50, 73-74, 77-81.)

g. CNAs

CNAs are primarily responsible for helping residents with their daily living needs. They work on one of three shifts. Between four and eight CNAs work during each of the three shifts. (ROA. 246-47; 36, 40.)

CNAs perform services for residents such as bathing, delivering meals, feeding, exercising, taking them to the bathroom, transporting them to other parts of the facility, and taking them to activities. CNAs also change bed linens and perform miscellaneous tasks necessary for the residents’ daily living needs. (ROA. 246; 40.) They chart the services they have provided to patients and maintain a daily log. (ROA. 247; 110-11.)

⁴ The maintenance assistant position was vacant at the time of the hearing.

CNAs are prohibited from administering medicine. (ROA. 246-47; 40, 127.) Nor do they consult with physicians. (ROA. 247; 74-75.) Even in an emergency, the CNAs consult immediately with an LPN or an RN, rather than taking action on their own. (ROA. 247; 74-75.)

Although Hall testified that the CNAs' base of operations was the nurse's station, CNAs testified that the LPNs and RNs discourage this; instead, the CNAs perform their charting duties in the hall using a hospital bedside table. (ROA. 247; 14-15; 110-111, 181-82.) In addition, despite Hall's testimony that the CNAs, like the LPNs and the RNs, use lockers behind the nurses' station to store personal belongings, CNAs testified that the LPNs and RNs discourage this use. (ROA. 247; 76, 181, 188-89.)

h. LPNs

LPNs' primary responsibility is the medical care of the residents. LPNs work one of three shifts, with two LPNs scheduled per shift. (ROA. 247; 14, 34-36.) During the night shift, the two LPNs are the highest-ranking officials at the Center. (ROA. 247-48; 44, 45.)

LPNs are based at the nurses' station. (ROA. 247-48; 41.) They order prescribed medication from the pharmacy and spend up to four hours a day administering medication to the residents. (ROA. 247-48; 41-42, 127-28.) LPNs are also authorized to contact physicians if necessary. (ROA. 248; 70, 75.) In

addition, LPNs observe residents and keep records of their care or treatment.

(ROA. 247; 182.) Four LPNs are considered “specialty nurses” and report directly to the Administrator: the Medical Records Nurse, the Minimum Data Set Coordinator, the Treatment Nurse, and the “QAPI Coordinator.” (ROA. 253; 30, 32-33.)

LPNs direct CNAs to perform certain tasks, such as weighing a resident or taking a patient’s vital signs. At the end of a shift, the LPNs review the CNAs’ charts and daily log. (ROA. 248; 127.) LPNs have trained CNAs in orientation in-service meetings. (ROA. 246; Tr. 38-39.) When necessary, LPNs assist the CNAs in performing their duties, but that is not one of the LPNs primary functions. (ROA. 248; 184.)

LPNs, like CNAs, officially report to the RN Supervisor or DON. However, CNAs testified that the Center instructs CNAs that LPNs are above them in the chain of command, and that CNAs must follow the LPNs directions. Accordingly, CNAs view LPNs as their supervisors. (ROA. 248, 256; 109, 121-22, 145-146.) Additionally, CNAs testified that LPNs had disciplined CNAs. (ROA. 248; 111-12, 133.)

i. RNs

Four RNs work at the Center. Their primary responsibility is to direct the medical care of the residents. Their work is based out of the nurses' station. One RN works on each of the two-day shifts. (ROA. 248-49; 34-35.)

B. During the Representation Hearing, Counsel for the Center States That Employees Waiting To Testify May Not Be Protected Under the Act

During the representation hearing, while three employees were present and waiting to testify for the Union, the hearing officer asked the Center's counsel Norman Mott and the Union's representative Randall Hadley if either party was going to call an LPN to testify. (ROA. 98-100.) Mott stated that he did not think the Center could afford to have an LPN out of the facility at that time. He then asserted that "we have a little bit of a shortage of employees who didn't provide us notice of their being subpoenaed [to testify at the representation hearing] until end of business yesterday." (ROA. 100.) Mott stated that he was not "real happy about that particular situation." (ROA. 100.)

Hadley replied that the Center could call in PRNs and part-time employees to cover for the employees. In response, Mott stated "Yeah. Uh-huh. Maybe if we have . . . given a little warning and I'm not sure this is 8(g)⁵ protected, either."

⁵ The Center does not dispute that although the transcript states that Mott said "AG," he actually said "8(g)."

(ROA. 100.) Section 8(g) of the Act prohibits employees of health care facilities from engaging in a strike without giving proper notice to the facility. *See* 29 U.S.C. § 158(g).

On October 31, 2013—hours after the representation hearing concluded—the Union filed an unfair-labor-practice charge with the Region based on Mott’s statement at the representation hearing. The charge, which was twice amended, alleged that the Center, by Mott’s comments, had threatened employees with discipline for their testimony at the hearing. (ROA. 322(057).) The Region investigated and found cause to issue a complaint alleging that Mott’s comments violated Section 8(a)(1).⁶

C. The Board Determines that a Unit Limited to Service and Maintenance Employees Is Appropriate and Directs an Election

On December 5, 2013, the Regional Director issued a Decision and Direction of Election (“DDE”) based on the facts established at the hearing and the standard elucidated by the Board, and enforced by the Sixth Circuit, in *Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 NLRB No. 83 (2011), 2011 WL 3916077, at *15-16 (2011) (“*Specialty*”), *enforced sub nom. Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013) (“*Kindred*”). As required by *Specialty*, the Regional Director first considered whether the Union’s petitioned-for unit of dietary employees, laundry employees, housekeeping

⁶ Thereafter, the parties resolved the complaint short of litigation.

employees, and CNAs was a readily identifiable group and shared a community of interest. (ROA. 254-55.) After examining the employees’ duties pursuant to the testimony, the Regional Director found the petitioned-for unit was not an appropriate unit. The Regional Director found that the petitioned-for unit was not “an identifiable group separate from other employees” because, although the proposed unit employees shared a number of terms and conditions of employment, “most, if not all, of the employees at the facility have those same terms and conditions of employment in common.” (ROA. 255.) The Regional Director determined that, in order to constitute an appropriate unit, other employees had to be included. Therefore, the Regional Director directed that an appropriate unit must also include the activity employees (“Activity Director” and “Activity Assistant”), Social Services Director, and the maintenance employees (“Maintenance Supervisor and Maintenance Assistant”), which constitutes “an appropriate service and maintenance unit” in a nursing home. (ROA. 255, 257, 259, 322(040-41).)⁷

The Regional Director next addressed the Center’s contention that the smallest appropriate unit must also include the LPNs, RNs, and the Business

⁷ On December 24, 2013, the Regional Director issued an Erratum to the DDE (ROA. 322(040-41)) clarifying that she found the activity employees, social service director, and maintenance employees to be part of an appropriate service and maintenance unit and was not requiring them to vote under challenge, as the original DDE mistakenly stated.

Manager. The Regional Director explained that *Specialty* requires an employer who wishes to expand the unit to establish that the additional employees share an “overwhelming community of interest” with the employees in the proposed unit, such that there is no legitimate basis upon which to exclude them. (ROA. 254.) Applying the overwhelming community-of-interest test here, the Regional Director noted distinctions between the directed unit and those employees that the Center sought to include in the expanded unit. Therefore, the Regional Director found that the Center failed to show that the LPNs, RNs, and Business Manager shared an overwhelming community of interest with her directed unit of service and maintenance employees. (ROA. 255-56.)

On December 17, 2013, the Center appealed the Regional Director’s decision. (ROA. 268-286.) On January 3, 2014, the Board (Chairman Pearce and Members Johnson and Schiffer) affirmed the decision and stated that “the fact that the unit found appropriate here was one directed by the Regional Director, instead of being the unit petitioned for by the Union, does not alter the applicability of [*Specialty*], and we treat the directed unit as the petitioned-for unit for purposes of the analysis.” (ROA. 289, 289 n.1.) Concurring, Member Johnson expressed no view about whether *Specialty* was correctly decided, but noted that “even in Board precedent decided prior to that case, employees in all service and maintenance classifications have been regarded as a readily-identifiable group appropriate for

inclusion in a single bargaining unit, and [LPNs] have been excluded on community of interest grounds from such a unit.” (ROA. 289 n.1.) On this record, he concluded that the Center failed to present sufficient evidence to distinguish those cases. (ROA. 289 n.1.)

D. The Board Holds a Secret-Ballot Election, the Union Wins

On January 3, 2014, the Board held a secret-ballot election among the directed unit of employees. The Union won by a count of 25-18. (ROA. 290.)

E. The Company Files Election Objections, Including an Objection That the Union Improperly Filed a Charge, and the Region Improperly Investigated and Issued a Complaint, Over Mott’s Statement at the Representation Hearing That Employees Waiting To Testify May Not Be Protected Under the Act

On January 10, 2014, the Center filed objections to the conduct of the election. (ROA. 293-95.) The Center objected to: the Regional Director’s unit determination (OBJ 1); the date of the election and the Regional Director’s later failure to reschedule the election (OBJ 2, 4); the Regional Director’s issuance of the December 24, 2013 Erratum (OBJ 3); the Regional Director’s instructions regarding the posting of official Board election notices (OBJ 4);⁸ and the date that the Board ruled on the Center’s request for review of the Regional Director’s DDE (OBJ 6). (ROA. 293-95.) As evidence in support of these objections, the Center presented only the election petition, the Regional Director’s DDE, the Erratum, the

⁸ The Center’s objections included two objections numbered “4.” (ROA. 293.)

Board's denial of the Center's request for review, the election notice, and a December 18, 2013 letter that Mott send to the Regional Director. (ROA. 295B001.)

The Center's remaining objection (OBJ 5) was to the Union's filing of the charge, which it later amended twice, and the Region's investigation of the charge and issuance of the complaint, over Mott's statement at the representation hearing that employees waiting to testify might not be protected under the Act. (ROA. 294-95.) Specifically, the Center's objection asserted that the Region improperly "accepted, investigated, and issued a complaint on a meritless unfair labor practice charge, and 2 amendments to the charge, accusing an agent of respondent of threatening, coercing, and otherwise interfering with employees section 7 rights." (ROA. 294.) The Center stated that the Union's and the Region's actions in response to Mott's statement at the representation hearing, including the timing of the issuance of complaint, "materially interfered with employer's rights under the First Amendment and Section 8(c) of the Act." (ROA. 294.)

In support of its objection, the Center relied on the unfair-labor-practice charge and amendments, the complaint, position letters and e-mails with the Region, and the election notice. (ROA. 295B001.) The Center stated that "as to each allegation employer may present a representative to authenticate documents and, if necessary, to testify about specific actions which interfered with its ability

to communicate with employees.” The Center further asserted that the “baseless” complaint “necessarily chills the employer’s ability to investigate and present specific evidence from bargaining unit employees of the subjective effect of the alleged objectionable conduct upon them.” (ROA. 295B002.)

F. The Regional Director Overrules the Center’s Objections

On February 5, 2014, after considering and investigating the Center’s objections, the Regional Director issued a Report on Objections. (ROA. 296-305.) In this Report, the Regional Director found that the Center had not presented evidence establishing the existence of substantial and material factual issues which, if resolved in its favor, would require setting aside the representation election. (ROA. 296, 296 n.1.) Specifically regarding the Center’s objection regarding Mott’s statement at the representation hearing, the Regional Director first found that the “alleged unlawful conduct contained in the complaint is attributed to the [Center],” and “[t]herefore, the [Center] is estopped from relying on this misconduct as objectionable.” (ROA. 303.) She also found that the Center “has not presented evidence that would establish that the issuance of the complaint had any effect on employee free choice, the laboratory conditions under which the election was conducted, or the outcome of the election.” (ROA. 303-04.) The Regional Director thus determined that the Company’s objections lacked merit and recommended that the Board overrule them. (ROA. 296-305.)

G. The Board Certifies the Union

On February 17, 2014, the Center petitioned the Board for review of the Regional Director's decision, contending that the Regional Director erred in overruling its objections and requesting that the Board should set aside the election or, in the alternative, hold a hearing on its election objections. (ROA. 309-22.) On November 19, 2014, the Board (Chairman Pearce and Members Johnson and Schiffer) found no merit to the Center's position and agreed with the Regional Director's recommendation to overrule the objections without a hearing. (ROA. 323-24.)

Specifically, the Board determined that the Center had not established that it could provide evidence that, if credited, would warrant setting aside the election. (ROA. 323, n.1.) Regarding the Center's objection to the charge and complaint concerning Mott's statement at the representation hearing, the Board found that the Center "offered no evidence" to support its theory that the Regional Director's issuance of the complaint "was the result of a conspiracy between the [Union] and the Region." The Board additionally found that the Center "did not explain how the investigation of the [Union's] charge could have been conducted differently, how the investigation intimidated the [Center] from discussing the charge during the critical period, or how the timing of the complaint's issuance was in any way

objectionable.” (ROA. 324 n.1.) Accordingly, the Board certified the Union as the employees’ exclusive bargaining representative. (ROA. 323-24.)

II. THE UNFAIR LABOR PRACTICE PROCEEDING

In December 2014, the Union requested that the Center recognize and bargain with the Union. (ROA. 369 n.1, 370; 360.) The Center refused, and the Union filed an unfair-labor-practice charge. (ROA. 370; 1, 325-26.) The Board’s General Counsel issued a complaint on February 6, 2015, alleging that the Center’s failure to bargain violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1). (ROA. 370; 327-335.) The Center admitted that it refused to recognize or bargain with the Union but defended on the grounds that it was testing certification. (ROA. 335, 360.)

On May 19, 2015, the Board’s General Counsel filed a motion for summary judgment. (ROA. 361-64.) On May 21, 2015, the Board issued a notice to show cause why the motion should not be granted. (ROA. 365.) In response, the Company repeated its challenges to the Board’s unit determination and the validity of the election proceedings. (ROA. 366-68.)

III. THE BOARD’S CONCLUSIONS AND ORDER

On July 14, 2015, the Board (Chairman Pearce and Members Johnson and McFerran) granted the General Counsel’s motion for summary judgment. (ROA. 369-71.) The Board determined that all representation issues were or could have

been litigated in the prior representation proceeding. (ROA. 369.) The Board also noted that the Center did not offer to adduce at a hearing any newly discovered and previously unavailable evidence. (ROA. 369.) Accordingly, the Board found that the Center's refusal to bargain with the Union violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1). (ROA. 370.)

The Board's Order directs the Center to cease and desist from refusing to bargain with the Union and, in any like or related manner, interfering with employees' rights under the Act. (ROA. 370.) It also directs the Center to bargain with the Union upon request and to embody any understanding reached in a signed agreement, and to post a remedial notice. (ROA. 370.)

SUMMARY OF ARGUMENT

The Board acted within its discretion in certifying a unit of service and maintenance employees in a nursing home as an appropriate unit for collective bargaining. Over two years ago, the Center's service and maintenance employees chose union representation in a Board-conducted, secret-ballot election. The Center admits that, since that time, it has refused to bargain with the Union, but defends its refusal by challenging the unit determination and the validity of the election. Both defenses fail.

As an initial matter, after considering the petitioned-for unit and determining that additional employees must be added to make the unit readily identifiable as a

group, the Regional Director applied the well-accepted community-of-interest test and determined that the dietary, laundry, housekeeping, activity, social services, maintenance employees, and CNAs are a readily identifiable group that share a community of interest and therefore constitute an appropriate unit of service and maintenance employees in a nursing home. That finding is consistent with well-established precedent and the evidence presented at hearing.

Also under settled law, the Regional Director found on this record that the Center failed to meet its burden of showing that the LPNs share an overwhelming community of interest with the service and maintenance employees, such that they must be included for the unit to be appropriate. The Regional Director's application of that heightened standard, recently clarified in *Specialty* and approved by the Sixth Circuit in *Kindred*, comports with the Board's prior jurisprudence.

In contesting the unit determination, the Center repeatedly misstates the applicable standard and its burden of proof. Contrary to the Center's arguments, it cannot simply show that another unit would be appropriate, or even more appropriate; it must establish that the determined unit is clearly *inappropriate*. The Center failed to make that showing. The Center's arguments before the Court mask the significant differences in duties between the LPNs and the other classifications in the unit, most notably the LPNs' unique and significant

responsibility to administer medicine, which the Center wrongly asserts is also performed by the CNAs. Thus, the Center has fallen far short of overcoming the Board's amply-supported conclusion that the exclusion of LPNs from the unit does not render the unit inappropriate.

The Board also acted within its discretion in overruling the Center's election objections without a hearing and certifying the Union. The Center failed to raise substantial and material factual issues which, if true, would be sufficient to set aside the election. In particular, the Center presented no evidence whatsoever to support its naked assertions that the Union's unfair-labor-practice charge over Mott's potentially threatening statement at the representation hearing, and the Region's investigation and issuance of a complaint, were in any way improper. Nor did the Center allege any facts which, if proven, would tend to show that any conduct by the Union or the Region materially affected the employees' free choice in the election or otherwise could reasonably be interpreted as grounds to overturn the election. Accordingly, the Board is entitled to enforcement of its Order requiring the Center to bargain with the Union.

ARGUMENT

I. THE BOARD ACTED WITHIN ITS DISCRETION IN DETERMINING THAT A UNIT OF SERVICE AND MAINTENANCE EMPLOYEES CONSTITUTES AN APPROPRIATE UNIT FOR COLLECTIVE BARGAINING

The Act prohibits an employer from refusing to bargain collectively with the representative of its employees. 29 U.S.C. § 158(a)(5). Here, the Center acknowledges (Br. 26-27) its refusal to bargain with the Union, but does so to contest the Board’s certification of the Union as the representative of its employees.

Contrary to the Center’s first defense, the Board reasonably determined that a service and maintenance unit in the nursing home was an appropriate unit for bargaining, and that the Center failed to demonstrate that the LPNs shared such an overwhelming community of interest with the unit employees so as to require their inclusion in the unit.⁹ Therefore, the Center’s claim that the unit was inappropriate without their inclusion does not excuse its refusal to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.¹⁰ *See Electronic Data Sys. Corp. v.*

⁹ We address the Company’s second defense based on its election objections in Section II, below.

¹⁰ Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [S]ection 7.” 29 U.S.C. § 158(a)(1). Section 7, in turn, grants employees “the right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing” 29 U.S.C.

NLRB, 938 F.2d 570, 572, 575 (5th Cir. 1991) (enforcing order where Board did not exceed its “large measure of informed discretion” in determining the appropriate bargaining unit).

A. Courts Give Considerable Deference to the Board’s Finding of an Appropriate Unit

Section 9(a) of the Act provides that a union will be the exclusive bargaining representative if chosen “by the majority of the employees in a unit appropriate for” collective bargaining. 29 U.S.C. § 159(a). Section 9(b) authorizes the Board to “decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by th[e Act], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.” 29 U.S.C. § 159(b). Construing that section, the Supreme Court has stated that the determination of an appropriate unit “lies largely within the discretion of the Board, whose decision, if not final, is rarely to be disturbed.” *South Prairie Constr. Co. v. Operating Eng’rs, Local 627*, 425 U.S. 800, 805 (1976) (internal quote marks and citation omitted); *accord NLRB v. J.C. Penney Co., Inc.*, 559 F.2d 373, 375 (5th Cir. 1977). Indeed, this Court has repeatedly stated that its review of the Board’s determination of the appropriate bargaining unit is “exceedingly narrow” and is “limited to determining whether the decision is

§ 157. A violation of Section 8(a)(5) results in a derivative violation of Section 8(a)(1). *See generally Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

arbitrary, capricious, an abuse of discretion, or lacking in evidentiary support.”

Electronic Data Sys., 938 F.2d at 573; accord *Vicksburg Hosp., Inc. v. NLRB*, 653 F.2d 1070, 1073 (5th Cir. 1981).

Section 9(b), however, does not tell the Board how to decide whether a particular grouping of employees is appropriate. Accordingly, the Board’s selection of an appropriate unit “involves of necessity a large measure of informed discretion.” *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947).

In deciding whether a group of employees constitutes an appropriate unit for collective bargaining, the Board focuses its inquiry on whether the employees are “readily identifiable as a group” and share a “community of interest.” *Specialty*, 2011 WL 3916077, at *12; accord *Electronic Data Sys.*, 938 F.2d at 573 (“In deciding whether a group of employees is an appropriate unit, this court has adopted the ‘community of interest’ analysis.”). The community-of-interest analysis considers such factors as similarity in skills, interests, duties, and working conditions, degree of interchange and contact among employees, the employer’s organizational and supervisory structure, and bargaining history. *Electronic Data Sys.*, 938 F.2d at 573; *NLRB v. DMR Corp.*, 795 F.2d 472, 475 (5th Cir. 1986). Moreover, the Board’s “discretion is not limited by a requirement that its judgment be supported by all, or even most, of the potentially relevant factors.” *DMR Corp.*, 795 F.2d at 475. Additionally, the Board is permitted to “consider[] extent of

organization as one factor, though not the controlling factor in its unit determination.” *NLRB v. Metro Life Ins. Co.*, 380 U.S. 438, 442 (1965); *accord DMR Corp.*, 795 F.2d at 475; *NLRB v. So. Metal Serv., Inc.*, 606 F.2d 512, 514 (5th Cir. 1979).

The Board’s decision must be upheld as long as it approves *an* appropriate bargaining unit. The Board has long recognized that there is nothing in the Act’s language requiring “that the unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit; the Act requires only that the unit be ‘appropriate.’” *Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950); *accord Electronic Data Sys.*, 938 F.2d at 573 (“It is the duty of [the Board] to select an appropriate unit; it need not delimit the *most* appropriate unit.”) (emphasis in original). The Supreme Court has agreed, stating that “employees may seek to organize ‘a unit’ that is ‘appropriate’ – not necessarily *the* single most appropriate unit.” *Am. Hosp. Ass’n*, 499 U.S. 606, 610 (1991).

This Court has recognized that, in many cases, the Board is faced with alternative appropriate units. *See J.C. Penney*, 559 F.2d at 375; *NLRB v. J.M. Wood Mfg. Co.*, 466 F.2d 201, 202 (5th Cir. 1972). Thus, the “choice among appropriate units is within the discretion of the Board.” *J.C. Penney*, 559 F.2d at 375. Accordingly, “to set aside a Board certified unit, . . . [a] showing that some other unit would be appropriate is insufficient.” *Id.* Instead, an employer

challenging the Board’s unit determination “has the burden of establishing that the designated unit is clearly not appropriate.” *Electronic Data Sys.*, 938 F.2d at 573 (quoting *NLRB v. Purnell’s Pride, Inc.*, 609 F.2d 1153, 1155-56 (5th Cir. 1980)). “[A] unit would be truly inappropriate if, for example, there were no legitimate basis upon which to exclude certain employees from it.” *Kindred*, 727 F.3d at 562 (citing *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008)); accord *Specialty*, 2011 WL 3916077, at *13-15 (2011). If the objecting party shows that excluded employees “share an overwhelming community of interest” with the petitioned-for employees, then there is no legitimate basis to exclude them. *Blue Man Vegas*, 529 F.3d at 421; accord *Kindred*, 727 F.3d at 562.

The Board’s findings of fact are “conclusive” if supported by substantial evidence in the record considered as a whole. 29 U.S.C. § 160(e); see *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *Strand Theatre of Shreveport Corp. v. NLRB*, 493 F.3d 515, 518 (5th Cir. 2007); *Central Freight Lines, Inc. v. NLRB*, 666 F.2d 238, 239 (5th Cir. 1982). Moreover, “a reviewing court may not “displace the Board’s choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.” *Universal Camera*, 340 U.S. at 488.

B. The Board Reasonably Determined that a Unit Limited to Service and Maintenance Employees Constitutes an Appropriate Unit

The Board acted well within its discretion by determining that the directed unit of service and maintenance employees in a nursing home, including dietary, laundry, housekeeping, activity, social services, maintenance employees, and CNAs, was an appropriate unit because it constituted a readily identifiable group sharing a community of interest. Further, the Board found that the Center failed to show that the LPNs shared an overwhelming community of interest with the directed unit such that the unit would be inappropriate if they were excluded.

1. The unit is readily identifiable as a group and shares a community of interest

The record evidence fully supports the Regional Director's finding that a unit of all service and maintenance employees at the Center is an appropriate unit because those employees are "readily identifiable as a group" and share a community-of-interest. (ROA. 254-57, 259, 289, 322(040).) The Regional Director first examined the petitioned-for unit and concluded that it was "not an identifiable group separate from other employees" because it included some employees that the Board traditionally includes in a service and maintenance unit in a nursing home (dietary, laundry, and housekeeping employees and CNAs), but excluded other employees (the activity employees, the Social Services Director, and the maintenance employees) traditionally included in such a unit and sharing

many terms and conditions of employment with the petitioned-for unit. (ROA. 255.) Therefore, the Regional Director directed a broader unit than the petitioned-for unit which also included the activity employees, Social Services Director, and the maintenance employees. (ROA. 255.) The RD's finding is consistent with Board precedent. In *Specialty*, the Board recognized that units of service and maintenance employees in nursing homes have long been appropriate. 2011 WL 3916077, at *11. For example, in *Marian Manor for the Aged & Infirm, Inc.*, 333 NLRB 1084, 1085 n.1, 1094, 1095, 1096 (2001), the Board found an appropriate unit of service and maintenance employees in a nursing home included CNAs and dietary, laundry, housekeeping, and maintenance employees, as well as “assistant admissions coordinators”—who have similar duties to the Social Services Director in the instant case. The Board further found a separate nursing unit for LPNs was appropriate. *See also Hillhaven Convalescent Ctr.*, 318 NLRB 1017, 1017 n.1 (1995) (appropriate unit of service and maintenance employees included CNAs and dietary, laundry, janitorial, and activity employees, excluding LPNs). Thus the Board has long found that these employees in service and maintenance classifications at a nursing home are a readily identifiable group, appropriately included in a bargaining unit. *See* ROA. 289 n.1 (Johnson, concurring).

The record also amply supports the finding that the unit of service and maintenance employees share a community of interest. They all share terms and

conditions of employment including benefits, recording time on a time clock, participating in resident activities, and attending meetings. (ROA. 245-46; 37, 113-14, 129-30.) Significantly, all share a similarity of function and skills as they are each involved in the day-to-day living needs of the Center's residents. The employees provide for the residents' needs, from preparing their food (dietary employees), washing their linens and clothing (laundry), cleaning their rooms (housekeeping), and bathing, dressing, and feeding them (CNAs), as well as providing for their psycho-social needs (Social Services Director), planning their activities (activity employees), and repairing items so they have a safe and efficient living space (maintenance employees). These employees also have frequent contact with each other spanning all shifts: dietary, laundry, and housekeeping employees have daily contact with CNAs (ROA. 249, 250; 112-113, 117-120); housekeeping employees have contact with dietary employees (ROA. 162-63); maintenance employees have contact with employees bringing repairs to their attention (ROA. 252; 77-81); the Social Services Director interacts with CNAs in working on the Plan of Care (ROA. 252; 67); and activity employees interact with all employees when participating in activities. (ROA. 251; 60.) Accordingly, the Regional Director reasonably determined that the service and maintenance employees share a community of interest. *See Electronic Data Sys.*, 938 F.2d at

573 (community-of-interest analysis considers factors including similarity in skills, interests, duties, and working conditions, and contact among employees).¹¹

The Center provides no grounds for overturning this well-supported unit determination. Contrary to its contention (Br. 62-63) that the Regional Director “provided no analysis of the record evidence to support” her finding, the Regional Director exhaustively described each employee classification and their shared terms and conditions of employment—discussed above—to reach her conclusion that the directed unit of employees constituted “an appropriate unit of service and maintenance employees.” (ROA. 246-53, 255.) Moreover, the Regional Director’s determination is well founded on evidence presented by the parties. At the representation hearing, the Union presented two CNAs and a former dietary employee who had since become a housekeeper to describe the specifics of their jobs. The Center presented only one witness, the Director of Operations in charge of all eight of the employer’s facilities, to describe the operation and all the employee classifications of this particular facility. The Regional Director’s directed unit is consistent with the evidence presented and Board precedent.

¹¹ Contrary to the Center’s confusing assertions (Br. 62-63), as the Board found, the fact that the Regional Director directed the employees to be included in the appropriate unit, rather than accepting the Union’s petitioned-for unit, “does not alter the applicability of [*Specialty*] [citations omitted], and we treat the directed unit as the petitioned-for unit for purposes of the analysis.” (ROA. 289.) Cf. *Odwalla, Inc.*, 357 NLRB No. 132, 2011 WL 6147417 at *5.

Throughout its brief the Center consistently misstates the applicable standard and its burden of proof. For example, while the Center seeks to add LPNs to the unit and refers to the service and maintenance employees at the nursing home as an “arbitrary” and “irrational” group (Br. 66), it does not specifically attack the shared functions and skills of the nonprofessional employees in the directed unit. Instead it focuses primarily on the relationship between CNAs and LPNs, asserting (Br. 62) that there is “‘overwhelming’ record evidence that [dietary, laundry, housekeeping, and maintenance employees] share ‘less of a community of interest with the CNAs than did the LPNs.’” But the Board need not find a greater community of interest among the unit at issue than with another grouping of employees. The Board need only find *an* appropriate unit, and not the *most* appropriate unit. *See Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950), and cases cited at pp. 29-30. As the Court has stated: “It is the duty of [the Board] to select an appropriate unit; it need not delimit the *most* appropriate unit.” *Electronic Data Sys.* 938 F.2d at 573. Moreover, as discussed below, it is the Center, as the party seeking to include additional employees in the unit, who must demonstrate that those additional employees “share an overwhelming community of interest” with the petitioned-for employees, such that there is no legitimate basis to exclude them. *Blue Man Vegas*, 529 F.3d at 421; *accord Kindred*, 727 F.3d at

562. Thus, the Center has not demonstrated that the Board abused its discretion by finding that the employees in the directed unit constituted an appropriate unit.

2. The Center has not shown that the LPNs share an overwhelming community of interest with the unit of service and maintenance employees

Consistent with *Specialty*, the Board reasonably concluded that the Center failed to meet its burden of showing that the LPNs share such an overwhelming community of interest with the dietary, laundry, housekeeping, activity, social services, maintenance employees, and CNAs, that excluding the LPNs would render the unit inappropriate. (ROA. 256-57, 259, 289, 322(040).)¹² The Center's contrary claims, based on the wrong burden of proof and on inaccurate representations of the facts, are without merit.¹³

¹² In its opening brief, the Center has not argued that any classification other than the LPNs should be included in the unit. Accordingly, it has waived any earlier claims that RNs should also be included in the unit. *See Proctor & Gamble Co. v. Amway Corp.*, 376 F.3d 496, 499 n.1 (5th Cir. 2004) (argument not raised in opening brief is waived).

¹³ The Center consistently argues that it is challenging the application of *Specialty's* overwhelming community of interest test. *See*, Br. 55 (heading III.); Br. 61 (approvingly citing *Specialty* as an example of the Board not making a prohibited assumption about the appropriateness of a petitioned-for unit). However, immediately preceding its discussion of *NLRB v. Lundy Packing Co.*, 68 F.3d 1577, 1581 (4th Cir. 1995), the Center confusingly makes a passing statement (Br. 56) that might be read to impugn the *Specialty* test itself ("the effect of requiring establishment of an overwhelming community of interest violates § 9(c)(5) of the Act," citing *Lundy*). This stray sentence, devoid of any developed argument, does not constitute a properly-raised challenge to *Specialty* itself. *See Justiss Oil Co. v. Kerr-McGee Refining Corp.*, 75 F.3d 1057, 1067 (5th Cir. 1996)

In examining the work of the CNAs and the LPNs, the Regional Director reasonably found that the Center failed to establish that “given the differences in their work, and the manner in which they view each other,” the LPNs “share such an overwhelming community of interest with a service and maintenance unit such that there is no legitimate basis to exclude them.” (ROA. 256, 289.) Significantly, the Regional Director found that the LPNs and CNAs “do not perform the same duties” despite the fact that they occasionally assist each other. (ROA. 255.) The CNAs primary duties are the day-to-day living needs of the residents such as dressing, bathing, and feeding them. (ROA. 246; 40.) Although the LPNs may, on occasion, assist the CNAs in those duties, the LPNs spend a significant portion of their day administering prescribed medication to residents. (ROA. 247-48; 41-42, 127-28.) The Center misrepresents the record (Br. 21) by stating that both the LPNs and the CNAs dispense medication to residents. To the contrary, the record evidence conclusively establishes that the CNAs are not allowed to administer medication. (ROA. 41.) Likewise, the evidence demonstrates that unlike CNAs, the LPNs may directly contact physicians about resident’s medical care. (ROA.

(issue raised to court on appeal but not argued in body of brief is waived by abandonment); *see also* Fed. R. App. P. 28(a)(8)(A) (argument in brief before the Court must contain party’s contention with citations to authorities and record). To the extent that the Center is asserting that the application of the overwhelming community of interest test here is inconsistent with *Lundy*, as discussed below at p. 41, the Center’s analysis is wide of the mark.

248; 70, 75.) The LPN's unique medical responsibilities in this regard strongly militate against the LPNs sharing an "overwhelming community of interest" with the CNAs and other non-medical service and maintenance employees. *Cf.*

Hillhaven, 318 NLRB at 1018 (excluding LPNs from service and maintenance unit including CNAs where LPNs, but not CNAs, could administer medication).

Moreover, the Regional Director reasonably found that "the CNAs regard the LPNs as their supervisors even if they are not supervisors as defined by the Act." (ROA. 256.) The Regional Director's finding is grounded in the CNAs' testimony that the Center instructs them that LPNs are above CNAs in the chain of command, and that CNAs must follow the directions of the LPNs. (ROA. 109, 121-22, 145-46.) Moreover, the CNAs testified that LPNs have disciplined CNAs. (ROA. 111-12, 133.) Before the Court, the Center simply ignores this record evidence.

The Regional Director's additional finding that "LPNs and RNs discourage" CNAs from working out of the nurses' station, where the LPNs are based, and from using the lockers behind it, further demonstrates the differences between the LPNs and the CNAs' working conditions. (ROA. 256.) This finding is supported by the record evidence. The CNAs testified they have been instructed by the Director of Nursing not to chart behind the nurses' station and were discouraged

from using the lockers. (ROA. 247; 110-11, 181-82, 188-89.) Once again, the Center (Br. 21) ignores this evidence.

The Regional Director further found that LPNs “are, generally, considered technical employees and it is not unusual for technical employees to be organized separately from service and maintenance employees if the [Union] so desires.” (ROA. 256.) *See Hillhaven*, 318 NLRB at 1018 n.6 (finding LPNs with duties similar to the instant case to be technical employees separate from service and maintenance employees). Given the above-described differences between the LPNs’ and CNAs’ duties, the Board reasonably found that the LPNs were not required to be included in the service and maintenance unit.

Although the Center initially stated the burden of proof correctly (*see* Br. 59, “the employer is required to make ‘a showing that the included and excluded employees share an overwhelming community of interest’”), it continues (see discussion above at p. 35) to misstate it, conveniently ignoring that the burden of proving that the employees it wants to include sits squarely on its own shoulders. (*See* Br. 64, incorrectly stating that *the Union* should have proven “that the excluded classifications lacked a community of interest with the included classifications.”) As discussed, *Specialty* requires the Center, as the party desiring expansion of the unit, to demonstrate that the excluded classifications share an overwhelming community of interest with the included classifications.

Even viewed in its most favorable light, the Center’s claims (Br. 20-22, 64-67) assert only that that a unit consisting of LPNs and CNAs would be a *more* appropriate unit. As this Court held long ago, the employer must show, not that another unit is more appropriate, but that the designated unit is “clearly not appropriate.” *Electronic Data Sys.*, 938 F.2d at 573-74, and cases cited at pp. 29-30. Particularly in light of the significant differences between the duties of the LPNs and the CNAs, the Center has failed to demonstrate that a service and maintenance unit excluding the LPNs is “clearly not appropriate.”

The Center curiously complains (Br. 62-65, 67) that the Board ran afoul of *NLRB v. Lundy Packing Co.*, 68 F.3d 1577 (4th Cir. 1995), because the Board relied on “the extent of the Union’s organization” to determine an appropriate unit. That claim is incorrect. First, and foremost, the Regional Director did not find that the Union’s petitioned-for unit was an appropriate unit. (ROA. 255.) Although it is true that, at the conclusion of the hearing, the Union eventually agreed—without formally amending its petition—to include the Maintenance Assistant and Activities Assistant in the unit, the Union always maintained that the Maintenance Supervisor, Activity supervisor, and Social Services Director should be excluded. (ROA. 205-09.) Against the Union’s wishes, the Regional Director included those classifications in her directed unit. (ROA. 259, 322(040).)

The Center further incorrectly suggests (Br. 64) that the Board's exclusion of the LPNs improperly elevated the extent of the Union's organization because the Union also wanted to exclude the LPNs. To the contrary, the Board did not violate the teaching of *Lundy* merely because it excluded a classification that the Union also wanted to exclude. The *Lundy* court's objection was that the Board had *presumed* the petitioned-for unit was appropriate instead of analyzing the issue under the traditional community-of-interest standard. *Lundy*, 68 F.3d at 1581; *see Lundy Packing Co.*, 314 NLRB 1042, 1043-44(1994). The court characterized the presumption applied by the Board as "a novel legal standard" that could only be explained by an effort to give controlling weight to the extent of organizing. 68 F.3d at 1581-82. The court specifically stated that a union's desire for a certain unit alone is not grounds for certification if a unit is "otherwise inappropriate." *Id.* at 1581. *See also Sandvik Rock Tools, Inc. v. NLRB*, 194 F.3d 531, 538 (4th Cir. 1999) (upholding Board's unit determination and noting the Board's decision in *Lundy* was unexplained departure from long history of prior precedent). The Board applied no such a presumption here. Rather, the Board considered the community-of-interest factors and looked beyond the extent of union organization. *Kindred*, 727 F. 3d at 564. Indeed, the Board included additional classifications beyond the petitioned-for unit to ensure that it was an appropriate unit. For all of these reasons, the Center has failed to demonstrate that the Board abused its

discretion in certifying the unit of service and maintenance employees, and the Court should uphold the Board's determination.

II. THE BOARD ACTED WITHIN ITS DISCRETION IN OVERRULING THE CENTER'S ELECTION OBJECTIONS WITHOUT A HEARING

The Center attempts to further justify its refusal to bargain by challenging the Board-conducted representation election that led to the Union's certification. The Board, however, properly determined that the Center failed to meet its burden of providing evidence that would warrant a hearing on its various objections claiming that the election should be overturned. Thus, the Court should uphold the Board's finding that the Center violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union.

A. Applicable Principles and Standard of Review

Congress has given the Board wide discretion in the conduct and supervision of representation elections. *NLRB v. A.J. Tower Co.*, 329 U.S. 324 (1946); *NLRB v. Rolligon Corp.*, 702 F.2d 589, 592 (5th Cir. 1983). This Court's review is limited to determining whether the Board has reasonably exercised its discretion, and if the Board's decision is reasonable and based upon substantial evidence in the record considered as a whole, the inquiry is at an end. *NLRB v. New Orleans*

Bus Travel, Inc., 883 F.2d 382, 384 (5th Cir. 1989); *Rolligon*, 702 F.2d at 592; *NLRB v. Klingler Elec. Corp.*, 656 F.2d 76, 85 (5th Cir. 1981).¹⁴

Indeed, representation elections are not lightly set aside. *NLRB v. Monroe Auto Equip. Co.*, 470 F.2d 1329, 1333 (5th Cir.1972). There is a strong presumption that ballots cast under specific Board procedural safeguards reflect the true desires of the employees. *Contract Knitter, Inc. v. NLRB*, 545 F.2d 967, 971 (5th Cir. 1977); *NLRB v. Zelrich*, 344 F.2d 1011, 1015 (5th Cir. 1965). Therefore, in challenging a representation election, the objecting party bears the burden of adducing prima facie facts sufficient to invalidate the election. *Klingler*, 656 F.2d at 79. Conclusory allegations are insufficient to meet this heavy burden; specific evidence of specific events is required. *NLRB v. Golden Age Beverage Co.*, 415 F.2d 26, 30 (5th Cir. 1969).

When the objecting party alleges that the conduct is committed by another party to the election, the objecting party must show not only that the acts occurred, but also that they “interfered with the employees’ exercise of free choice to such an extent that they materially affected the results of the election.” *Golden Age*, 415 F.2d at 30. When the objecting party alleges that an agent of the Board committed the conduct at issue, that party must show that the conduct “tends to destroy

¹⁴ The Center is therefore wrong (Br. 30, “B. 1, 2.”) in stating that this Court applies de novo standard of review to the Board’s conduct of the election.

confidence in the Board’s election process,” or “could reasonably be interpreted as impugning the election standards [the Board] seek[s] to maintain.” *NLRB v Osborn Transp. Inc.*, 589 F.2d 1275, 1280 (1979).

It is settled that a party challenging a representation election is not entitled to a post-election evidentiary hearing as a matter of right. *Golden Age*, 415 F.2d at 32-33; *NLRB v. Smith Indus., Inc.*, 403 F.2d 889, 894 (5th Cir. 1968). Such hearings are required only when the objecting party raises “substantial and material factual issues” supported by a specific proffer of evidence which, if true, would be sufficient to set aside the election. *Gulf Coast Automotive Warehouse Co. v. NLRB*, 588 F.2d 1096, 1098 (5th Cir.1979); 29 C.F.R. § 102.69(d) (hearing only required “with respect to those objections or challenges which the RD concludes raise substantial and material factual issues”). “The burden is on the objecting party to present a prima facie case requiring the overturning of the election—which requires specific evidence of specific events from or about specific people which support assertions which, if true, would be legally sufficient to upset the election.” *United Steelworkers of America v. NLRB*, 496 F.2d 1342, 1348 (5th Cir. 1974). That burden cannot be met by “nebulous and declaratory assertions.” *Transcare New York, Inc.*, 355 NLRB 326 (2010) (quoting *Amalgamated Clothing Workers v. NLRB*, 424 F.2d 818, 828 (D.C. Cir. 1970)). In reviewing the Board’s determination whether a party has met its burden of proof to warrant an evidentiary

hearing, this court is “mindful of the wide degree of discretion entrusted to the Board in representation matters, as well as our duty to determine only whether the Board’s conclusion is reasonably drawn from the evidence submitted and the circumstances surrounding the election.” *Golden Age*, 415 F.2d at 33 (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).)¹⁵

B. The Board Properly Overruled the Center’s Objections Without Holding a Hearing

Before the Board, the Center asserted that the Union and the Region destroyed the requisite laboratory conditions under which an election should be held by the Union’s filing of an unfair-labor-practice charge, the Region’s investigation of the charge, and the issuance of a complaint. After examining the objection, the Board found that the Center failed to demonstrate that “the issuance of the complaint had any effect on employee free choice, the laboratory conditions under which the election was conducted, or the outcome of the election,” and

¹⁵ The Center claims (Br. 30) that this Court reviews de novo whether a party is entitled to an evidentiary hearing, citing *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 332 (5th Cir. 1991). Although *Hood* and other Fifth Circuit cases use that standard, this Court employed the more deferential *Universal Camera* standard in its earlier *Golden Age* decision, cited above. The Board maintains that because *Golden Age* is the earlier panel decision, the standard in that case controls. See *Rios v. City of Del Rio, Tex.*, 444 F.3d 417, 425 n.8 (5th Cir. 2006) (rule in this circuit is that where two previous holdings or lines of precedent conflict, the earlier opinion controls absent an intervening holding to the contrary by the Supreme Court of this Court en banc). Here, the Board’s decision satisfies either standard. See *Hood*, 941 F.2d at 332 (“considerable weight must be assigned to the NLRB’s existence or nonexistence of substantial and material factual issues”).

therefore overruled the objection without a conducting hearing. (ROA. 304). The Center devotes over 20 pages of its brief (Br. 33-55) to repeating its wholly unfounded accusations against the Region’s handling of the Union’s unfair-labor-practice charge. The Center’s unsupported hyperbole regarding the investigation and issuance of the complaint amounts to nothing more than baseless speculation that is woefully insufficient to warrant setting aside the election. Accordingly, the Board did not abuse its discretion in overruling this objection without a hearing.¹⁶

As the Board reasonably found (ROA. 323), the Center failed to “provide evidence that, if credited, would warrant setting aside the election.” As shown (p. 15), the Union filed an unfair-labor-practice charge with the Region over Mott’s statement at the October 31, 2013 representation hearing. At the hearing, in the presence of employees waiting to testify pursuant to subpoena and after suggesting that the Center was short staffed, Mott suggested that the employees were violating the Act, stating that he “was not sure” that employees were “8(g) protected.” That section of the Act, which addresses strike activity by health care employees in an

¹⁶ The Center has not properly raised any other election objections to the Court. Although the Center makes passing reference to its other objections on one page of its argument (Br. 48), it sets forth no citations to authorities, nor does it otherwise present arguments as to why these objections were improperly overruled. Issues nominally raised, but not substantively argued, are considered waived. *See Justiss Oil Co. v. Kerr-McGee Refining Corp.*, 75 F.3d 1057, 1067 (5th Cir. 1996) (issue raised to court on appeal but not argued in body of brief is waived by abandonment); *see also* Fed. R. App. P. 28(a)(8)(A) (argument in brief before the Court must contain party’s contention with citations to authorities and record).

effort to avoid under staffing, has very specific requirements and failure to abide by them can result in loss of the Act's protection and discharge. *See Minnesota Licensed Practical Nurses Assoc. v. NLRB*, 406 F.3d 1020 (8th Cir. 2005) (strike unprotected under Section 8(g), despite notice). In response to the charge filed by the Union, the Region investigated the charge, as amended, and found cause to issue a complaint on December 31, 2013. The complaint alleged that the Center "threatened employees with discharge for participating in and/or attending the Board Hearing." (ROA. 288A2.) Under its usual procedure, the Region mailed the complaint to the Center, that received it on January 2, 2014, the day before the election. (ROA. 302.)

Contrary to the Center's claim (Br. 33-39), the availability of defenses to the Union's unfair-labor-practice charge, including a First Amendment defense, does not provide evidence that the Union's charge was "baseless" or that the Region should have ignored its obligation to investigate a charge or issue a complaint. Indeed, even the Center acknowledges (Br. 39) that threatening statements made during Board proceedings may constitute an unfair labor practice. *See Iowa Beef Processors, Inc.*, 226 NLRB 1372 (1976), *enforced in relevant part*, 567 F.2d 791 (1977).

Moreover, and contrary to the Center's claims (Br. 44-46), the Region engaged in a good-faith effort to fully explore the facts underlying Mott's

statement at the representation hearing that implied that employees who had attended the hearing had somehow engaged in an unprotected strike under Section 8(g) of the Act and could face reprimand. *See* ROA. 322(062-63) (Nov. 18, 2013 letter from the Region requesting evidence of what Mott meant by his statement, how the employees' attendance at the representation hearing affected the Center's work production, and whether the Center was shorthanded that day). The information sought during the investigation might have supported Mott's statement that the employees were engaging in activity unprotected by the Act. Far from establishing "a prima facie case requiring the overturning of the election," *United Steelworkers*, 496 F.2d at 1348, the evidence demonstrates that the Region appropriately investigated and analyzed the Union's unfair-labor-practice charge.

In addition, the Center's bald accusations that the Region otherwise engaged in "bad faith" (Br. 44) or "malfeasance" (Br. 67) are entirely unfounded. Contrary to the Center's claim (Br. 46-47), any delay in issuing a complaint during the holiday season is unremarkable. The Company also does not advance its case by alleging (Br. 47) that something improper occurred because the complaint was sent to it by regular mail. It is standard Board procedure to mail complaints by regular mail. *See* Board Rule 102.113 (service of complaint by registered or certified mail). Accordingly, the Center utterly failed to demonstrate that it was entitled to a hearing, nor has it otherwise established that conduct by the Union or the Region

warranted overturning of the election. *Cumberland Nursing & Convalescent Ctr.*, 248 NLRB 322, 323 (1980) (“it is not enough for the objecting party’s evidence merely to imply or suggest that some form of prohibited conduct has occurred”).

In any event, the Center offers no support whatsoever for its assertion (Br. 40-41, ROA. 294-95, 295B001) that the Region’s investigation of the charge and issuance of the complaint “necessarily” chilled the employer from communicating with its employees about Mott’s statements, or the election in general, or in any way tended to affect the results of the investigation or impugn the election standards. *See Gulf Coast Automotive Warehouse Co. v. NLRB*, 588 F.2d at 1098 (party must provide “specific proffer of evidence” which, if true, would be sufficient to set aside the election). Once again, the Center relies on speculation and bald assertions to support its claim. Likewise, the mere fact that the Region issued a complaint a few days prior to the election does not constitute a proffer that the timing of either the investigation or the complaint was improper, nor that they in any way affected the election. Indeed, not only is there no evidence, the Center has not even *alleged* that any employees knew about the charge, investigation, or complaint. As the Board reasonably found, the Center “did not explain how the investigation of the [Union’s] charge could have been conducted differently, how the investigation intimidated the [Center] from discussing the charge during the critical period, or how the timing of the complaint’s issuance was in any way

objectionable.” (ROA. 324 n.1.) *See Clearwater Transp., Inc. v. NLRB*, 133 F.3d 1004, 1012 (7th Cir. 1998) (no hearing required because objecting party’s “conjecture and speculation [we]re insufficient to establish a prima facie case of misconduct sufficient to set aside the election”).

Finally, the Center’s remaining challenges (Br. 50-51) to the Regional Director’s actions are without merit. The Center complains that the Regional Director incorrectly relied on an estoppel theory in overruling the Center’s objections, asserting that the Center could not rely on its own allegedly unlawful conduct to defeat an election. However, the Regional Director also found (ROA. 303), and the Board affirmed, that the Center failed to provide evidence “that the issuance of the complaint had any effect on employee free choice, the laboratory conditions under which the election was conducted, or the outcome of the election.” Thus, her estoppel finding was not determinative.

Once again, the Center confuses matters by stating that the Regional Director “incorrectly decide[d] the merits of the pending unfair labor practice trial adverse to the employer.” (Br. 50.) The Regional Director did not do so; the representation proceeding is separate from the unfair-labor-practice proceeding, with different procedures. Indeed, had the unfair-labor-practice complaint gone to a hearing, it would have been decided by an administrative law judge, and then the Board. *See* 29 C.F.R. § 102.45.

Finally, notwithstanding the Center's complaint (Br. 50-51), the Regional Director was not required to send the objection to another official simply because the Center made an unsupported accusation—with no specific proffer of evidence—that the Region had engaged in misconduct. In any event, the Center received Board review of the Regional Director's decision. As shown above, nothing that the Center provided to the Regional Director or the Board met its burden of establishing that any misconduct occurred, let alone that any such conduct would have been sufficient to warrant overturning the election. Accordingly, the Center's defenses fail, and the Board is entitled to enforcement of its Order requiring the Center to bargain with its employees' chosen representative.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

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February 2016

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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	:	
Petitioner	:	
	:	Case No. 15-60669
v.	:	
	:	Board Case No.
VCNCL, L.L.C. d/b/a VINEYARD COURT	:	15-CA-144945
NURSING AND REHABILITATION CENTER	:	
	:	
Respondent	:	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 11,784 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

COMPLIANCE WITH CONTENT AND VIRUS SCAN REQUIREMENTS

Board counsel certifies that the contents of the accompanying CD-ROM, which contains a copy of the Board's brief, is identical to the hard copy of the Board's brief filed with the Court and served on the petitioner/cross-respondent. The Board counsel further certifies that the CD-ROM has been scanned for viruses using Symantec Antivirus Corporate Edition, program version 12.1.6 (12.1.RU6MPC) Build 6608 (12.1.66.08.6300) According to that program, the CD-ROM is free of viruses.

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Dated at Washington, DC
this 8th day of February 2016

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CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the address listed below:

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this 8th day of February, 2016